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FILED
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1960.

No. 795

[illegible] COLLINS,

Petitioner,

vs.

[illegible] PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of Calif[illegible]nia, in and for the Second Appellate District, Division Three.

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SAMUEL D. COLLINS,

Petitioner,

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the District Court of Appeal of the State of California, in and for the Second Appellate District, Division Three.

To The Honorable Earl Warren, Chief Justice and to the Honorable Associate Justices of the Above Entitled Court:

This Petition for the Writ of Certiorari respectfully represents and shows to this Honorable Court:

I.
Opinion Below.

The District Court of Appeal of the State of California, in and for the Second Appellate District, Division Three, an Intermediary Court of Appeal in which a decision on appeal may be had as a matter of right, affirmed the Judgment of Conviction on November 14, 1960 reported as *People v. Collins,* 186 A. C. A. 366, while the Supreme Court of the State of California,

the Highest Court of the State in which a decision may be had, summary declined to exercise its discretion, on January 4, 1961, and denied a Petition for Hearing without opinion filed, as reported in the Minutes of California Supreme Court in 55 Advance California Reports, No. 4, Minutes, page 2.

H.

Summary and Short Statement of Matter Involved.

The Petitioner was charged by information, in the Superior Court of the State of California, in and for the County of Los Angeles, with eight counts of abortion, in violation of Section 274 of the California Penal Code, and three prior felony convictions* [C. T. pp. 1-9]; that a plea of "Not Guilty" was entered [C. T. p. 11]; that the petitioner and all counsel waived trial by jury and consented to trial before the Court. [C. T. p. 13.]

The Trial Judge denied a motion to suppress evidence obtained by unlawful search and seizure and considered the unlawfully obtained evidence in determining the defendant's guilt.

At the conclusion of the trial, the Trial Judge found the defendant guilty of each charge contained in the information upon the uncorroborated testimony of statutory "suspect" witnesses and the evidence obtained by unlawful search and seizure, imposed multiplicity of

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*C.T. designates Clerk's Transcript and R.T. designates Reporter's Transcript.

penalties on the eight charges involving three women and sentenced the defendant to the State Prison.

The case was appealed to the District Court of Appeal of the State of California, Second Appellate District, Division Three, on intermediate court, resulting in afirmance of the judgment of conviction of the lower Court, with Petition for Rehearing, and a Petition for Hearing in the California Supreme Court summary denied without opinion filed.

III.
Basis of Jurisdiction.

The Judgment of the State Court sought to be reviewed was entered November 14, 1960, by the said District Court of Appeal of the State of California (*People v. Collins,* 186 A. C. A. 366), and a petition for hearing summary denied without opinion by the Supreme Court of the State of California, the highest State Court in which a decision may be had, on January 4, 1951. (See record.)

This Honorable Court has jurisdiction to issue the writ of certiorari and review the said State Court's judgment under authority of Article III, Section 2, Paragraphs 1 and 2, of the Fourteenth Amendment to the Constitution of the United States; Section 237(b) of the Judicial Code of the United States; Rule 38 of the Rules of the Supreme Court of the United States, and the Acts of Congress made and provided in such case.

IV.

Federal Question Presented.

1. Was the Petitioner denied procedural due process of law, guaranteed by the Fourteenth Amendment to the United States Constitution by basing the judgment of the State Court on the uncorroborated testimony of "suspect" witness requiring corroboration by the States statutory law?

2. Was the Petitioner denied and deprived of a fair trial, in the State Court, by the admission in evidence, over objection and motion to suppress, the evidence obtained by unlawful search and seizure, without search warrant or probable cause.

3. Was the imposition of the multiplicity of sentences on the claimed intent and design of three alleged abortees, involving eight counts of abortion, a violation of due process of law?

V.

Reasons Relied on for Allowance of the Writ.

The judgment of the State Court under attack is based solely upon the uncorroborated testimony of "suspect" witnesses, in violation of procedural due process of law, contrary to and in violation of the statutory mandate of the California Legislature prohibiting criminal conviction for the crime of abortion on the uncorroborated testimony of the abortee (Sec. 1108 of the Penal Code of California); the evidence obtained through unlawful search and seizure over objection and

motion to suppress, and the punishment of the Petitioner twice for the same identical acts constituting but one offense under the pleading as to each of the three alleged abortees.

The decision of the said California Court of Appeal, an intermediate Appellate Court in which a decision may be had as a matter of right, while in error the said decision was necessary to the determination of the substantial federal questions herein complained of and specially set up, pleaded and relied upon in the State Courts; the summary denial of the Petition for Hearing by the Supreme Court of California without opinion filed was likewise in error, but necessary to exhaust State Court remedies to invoke jurisdiction in this Honorable Court for determination of the said federal questions by issuance of the writ of certiorari.

The federal questions herein urged were first raised i the trial court and specially setup, pleaded and relied upon in the California Reviewing Court on appeal, for the petitioner's protection against the wrongs of said respondent. (See page 11 of the typewritten opinion in the record wherein reference is made to petitioner's objection to invasion of rights.)

Authorities Sustaining Federal Questions.

1. In relation to lack of corroboration of "suspect" witnesses testimony:

People v. MacEwing, 45 Cal. 2d 218, 224;
People v. Buffum, 40 Cal. 2d 709;
People v. Channell, 107 Cal. App. 2d 192;
People v. Coakley, 108 Cal. App. 2d 223;
People v. Robarge, 111 Cal. App. 2d 87;
People v. Braun, 31 Cal. App. 2d 593;
Calif. Penal Code, Secs. 1108 and 1111;
Calif. Const., Art. I, Sec. 13;
Fourteenth Amendment to the United States Constitution.

2. In relation to the admission of unlawfully obtained evidence:

People v. Cahan, 44 Cal. 2d 434;
People v. Schaumloffel, 53 A. C. 2d 91;
People v. Mills, 146 Cal. App. 2d 392;
Henry v. United States, 364 U. S. .....;
Rios v. United States, 364 U. S. 253;
Fourteenth Amendment, United States Constitution.

3. In relation to multiplicity of eight penalties for the same intent and design charged in the pleading involving three women:

In re Hess, 45 Cal. 2d 171;
People v. Lima, 127 Cal. App. 2d 29;
People v. How, 99 Cal. App. 2d 808;
People v. Freeman, 111 Cal. App. 2d 11.

ARGUMENT.

I.

The Petitioner's Conviction and Imprisonment on the Uncorroborated Testimony of "Suspect" Witnesses Is in Violation of Procedural Due Process of Law, Guaranteed to the Accused Against State Action by the Fourteenth Amendment to the Constitution of the United States.

The District Court states in the decision that it gives full recognition to the requirements of Section 1108 and Section 1111, of the Penal Code, relating to cooperation if the conviction under the information is to stand. Further holding that in determining the sufficiency of corroborative evidence, the same tests are applicable to both Sections 1108 and 1111, of the Penal Code. The Court then cites *People v. MacEwing*, 45 Cal. 2d 218, at page 224, and further quotes from page 225. It was held there that corroborating evidence must tend to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated, is telling the truth, and that the corroboration is not adequate if it requires aid from the testimony of the person to be corroborated in order to connect the defendant with the commission of the offense charged. Reference is also then made to *People v. Brown*, 49 Cal. 2d 577, 583. The Court then quotes from *People v. Gallardo*, 41 Cal. 2d 57, pages 63 and 64, wherein it was held that the testimony of one woman that a person performed an abortion on her, is not of itself sufficient to corroborate the testimony of the second woman that the same person committed an abortion on her and

it has been held that there is sufficient corroboration if the independent testimony of the woman shows that such abortion was committed in a similar manner.

The Court then cites *People v. Weiss,* 50 Cal. 2d 335, 568; *People v. Bowley,* 135 Cal. App. 2d 519, 527, "One of the reasons for this is that the testimony of two people who independently went through the same procedure tend to establish the credence of both." (*People v. Collins,* 186 A. C. A. 366, at 374.)

The Court then goes into a discussion of the evidence in the present case and comes to the conclusion that the requirements were amply met. That as to each Count, it was complete in itself and did not require resort to the testimony of the witness who had to be corroborated for interpretation and direction. The Court said on page 15, of the typewritten decision, that each woman's testimony clearly corroborates that of the person who knowingly brought her to the Appellant's home for the illegal purpose and that the testimony of the women showed that each abortion was committed in a similar manner.

The Court then states that in reaching the determination that the corroborative evidence was sufficient, treated as an accomplice the person who accompanied the particular woman to the appellant's house and further disregarded the testimony of the physician for failing to connect the appellant with the alleged abortions, and further, no consideration was given to appellant's failure to testify, for it does not constitute the corroboration required by statute, but lends weight and is pursuasive to evidence presented by the prosecution upon matters presumptively within defendant's knowledge and which if truly stated, would be denied by him.

From the verbiage used by the Court in the decision as to corroboration of accomplices and the alleged abortees, the Court upholds the judgment and the order denying the motion for a new trial solely upon the last sentence of the first paragraph on page 375 of the decision, 186 A. C. A.

> "that testimony of the woman showed that each abortion was committed in a similar manner."

The Court's conclusion as to the necessary corroboration required in this case, is diametrically opposed to the very cases cited by the Court in its decision for the *Gallardo* case, *supra,* states very clearly "although the testimony of one woman that a person performed an abortion upon her is not of itself sufficient to corroborate the testimony of a second woman, that the same person committed an abortion upon her, it has been held that there is sufficient corroboration if the independent testimony of the woman shows that the abortion was committed in a similar manner."

What the Court obviously meant in the *Gallardo* case, *supra,* was that two abortees could not corroborate each other's testimony and that there must be independent testimony corroborating the women that the abortions took place. To interpret the decision in any other manner would be to disregard the very first part of the sentence that one abortee could not corroborate the testimony of the second abortee.

The law is too well recognized that the sufficiency of corroborative evidence of Sections 1108 and 1111 of the Penal Code, come within the same rule of law. The corroborating evidence must come apart from the untrustworthy witnesses for the untrustworthy, with their

"suspect evidence," cannot corroborate each other under the true interpretation of the statutes involved.

In *People v. Robinson*, 43 Cal. 2d 132, the Court said that the statutory requirement of corroboration is based primarily upon the fact that experience has shown that evidence of an accomplice should be viewed with care, caution, and suspicion because it comes from a tainted source and is often given in hope or expectation of leniency or immunity. In *People v. Buffum*, 40 Cal. 2d 709, the Court said that the purpose of Section 1108 of the Penal Code, was to provide a safeguard against the danger that testimony of the woman who submitted to and willingly participated in abortion may be colored in expectation of immunity or maybe otherwise untrustworthy.

In *People v. Goldstein*, 136 Cal. App. 2d 778, it was held that corroboration is inadequate if requiring aid from testimony of persons to be corroborated to connect defendant with the crime. In *People v. MacEwing*, 45 Cal. 2d 218, the Court held that the rules governing corroboration under Section 1111 of the Penal Code, are applicable to Section 1108 of the Penal Code, which requires corroboration of the abortee.

It is difficult to understand how the independent testimony of one abortee could connect the defendant with the alleged offense for certainly both women were not present at the same time and could not testify to any element of the abortion, if one had taken place, on each at a different time. In brief, neither woman could testify to the essential elements of the offense in connection with each other, for to hold otherwise would be to do the very thing the Court says cannot be done, is

the drawing upon the evidence of the witness who requires corroboration.

The law is uniform in California that one accomplice cannot corroborate that of another and the rule should be applied in the present case, this the District Court has not seen fit to do in the present case.

In *People v. Channell,* 107 Cal. App. 2d 192, the Court says that the corroborative evidence must of itself be of inculpatory character and must stand without the aid of evidence of accomplices to implicate defendant in the commissions of the crime.

In *People v. Coakley,* 108 Cal. App. 2d 223, the test of corroboration is well stated wherein it is held that when an accomplice's testimony is disregarded and the remaining evidence is inculpatory and tends to connect defendant with the offense charged, then the accomplice is corroborated. If this rule is used in the present case by disregarding the testimony of the first woman there is no evidence remaining, for certainly the second woman can give absolutely no testimony regarding the alleged offense testified to by the first woman.

It is difficult to understand how two "suspect witnesses" can turn unreliable testimony into reliable testimony, for certainly two falsehoods cannot make a truth.

It is respectfully and seriously urged that the defendant on the basis of the Appellate Court's decision is denied procedural due process of law of the State and Federal Constitution wherein the judgment of conviction is affirmed on the basis of two witnesses who gave "suspect evidence" and by statute are proved un-

trustworthy and uncapable of corroborating each other to establish that any offense had been committed.

The descriptive similarity of technique, the same physical sensation, and the method of treatment cannot be the basis of corroboration of two women who come within the statutory meaning of untrustworthy witnesses, for necessarily the very nature of the proof of similarity of technique, the same physical sensation and the method of treatment must come from each other, for testimony from one "suspect" witness alone proves nothing under the dominent requirement of Section 1108 of the Penal Code. Plain arithmetic shows us that 0 plus 0 equals 0. It is that simple.

The fact that the accused was on the horns of a perplexing dilemma, on the one horn invoking his Constitutional right to remain silent and let the People prove their case beyond a reasonable doubt allowing the prosecutor to argue to the jury the defendant's failing to take the witness stand, while on the other horn, he could take the witness stand and testify in his own behalf and allow the prosecutor to impeach his testimony by the fact he had previously been convicted of felony, not a very attractive choice. (*People v. Robarge*, 111 Cal. App. 2d 87.)

The three women testified they had been aborted by the defendant but there is no independent evidence from any other source that remotely connects the defendant with the crimes charged. The testimony of the persons

who transported the three women to defendant's residence, if it had been corroborated (which it was not), would prove no more than that the defendant was present and had the opportunity to commit the charged offenses, but mere association is not enough for conviction (*Ding Haw v. Superior Court,* 81 Cal. App. 2d 154; *People v. Braum,* 31 Cal. App. 2d 593), nor may a conviction rest upon opportunity to commit the offense or mere suspicion. (*People v. Braum, supra; People v. Draper,* 69 Cal. App. 2d 781.)

It is seriously urged that there is no valid corroboration of the testimony of the abortees or accomplices as required by Sections 1108 and 1111 of the Penal Code, thus amounting to a judgment of conviction based upon no competent evidence, in violation of the due process law of the Fourteenth Amendment to the Constitution of the United States, and a like provision in Article I, Section 13, of the California Constitution.

In order to sustain conviction on testimony of a witness whose testimony requires corroboration, such corroboration must connect the accused with some element of the particular offense on which they give testimony.

What the State reviewing Court has obviously done in the present case is to take the testimony of two witnesses (each of whom require corroboration) relating to different offenses at different times and by the unusual process of combining the two and while neither witness can testify to an element of the particular abortion other than her own, it is from similarity of of-

fenses that the reviewing Court bases its opinion in affirming of the judgments.

To hold that similarity of offenses meets the statutory requirement of corroboration, of "suspect" witnesses, is to hold that mere similarity of various offenses of abortion, or any type of offense, is evidence of guilt. This is not and cannot be the law under our American system of jurisprudence, for guilt must be proved, by the State, beyond a reasonable doubt and not inferred, presumed or by conjecture, for the accused is Constitutionally guaranteed a fair trial at which guilt must be proved by evidence and not inferred, presumed or arrived at by conjecture.

There is yet another consideration which the State Courts have conveniently neglected to give consideration, that is under the criminal conspiracy statute, Section 182 of the California Penal Code, and Sections 27 and 31 of the same Code, designating that all persons who cause, aid, advise or encourage another person to commit an offense, whole or in part, is liable for prosecution and punishment therefore as principles. It is thus that the abortee and abortionist, under Section 274 of the California Penal Code, that the aborted woman is an accomplice to the accused within the meaning of Section 1111 of the same Penal Code, and the testimony of such an accomplice cannot be the basis of conviction without corroboration by such other evidence as shall tend to connect the defendant with the commission of the offense, and such corroboration is

not sufficient if it merely shows the commission of the offense or the circumstances thereof. It is interesting to note that Section 1108 of the California Penal Code, specifically mentions the crime of abortion among other crimes that require corroboration of the testimony at a trial for procuring or attempting to procure an abortion, or aiding or assisting therein. Two accomplices are incapable, under the statutes, of corroborating the testimony of each other and the corroborating evidence must connect the accused with an essential element of the crime, for proof that the offense took place without connecting the accused therewith, is not sufficient to sustain the judgment of conviction as the reviewing Court has done in the present case.

In *People v. Lima* (1944), 25 Cal. 2d 573, at 578, 579, and *People v. Raven* (1955), 44 Cal. 2d 523, at 526, it was held that the testimony of a co-conspirator, as aiding and abetting in the offense, whether charged or not, requires corroboration before a conviction can be upheld on appeal.

The reviewing Court decision affirming the judgment of conviction in the present case is contrary to and in violation of procedural due process of law clause of the Fourteenth Amendment to the Constitution of the United States and similar provisions in the California Constitution.

II.

The Unlawful Search and Seizure of Evidence and the Admission Thereof at the Trial to Aid in Obtaining the Petitioners' Conviction, Contrary to and in Violation of the Due Process of Law Clause of the Fourteenth Amendment to the Constitution of the United States and a Similar Provision in the California Constitution, Article I, Section 13.

The District Attorney's investigator arrived at the defendant's home with a warrant for the defendant's arrest. The defendant was placed under arrest and the officer proceeded to search the defendant's house without benefit of search warrant and the search was not incident to the arrest nor was there consent on the part of the petitioner, for the arrest, search and seizure of evidence used at the trial was made some months after the offenses alleged in the information and the search was not related to the arrest, for the warrant of arrest issues from the Complaint based upon probable cause that an accused is guilty of some criminal offense and thus it was an exploratory search.

In the present case, the search was not a customary search for weapons or any specific evidence in connection with the arrest, for if it was a search warrant it would have been just as obtainable as was the warrant for arrest upon the probable cause, upon which the complaint was issued.

The decision of the Appellate Court has held in disregard of the defendant's Constitutional rights that:

> "The arrest pursuant to the warrant was valid and the accompanying search of the premises in-

cident thereto was proper, there being no requirement under such circumstances that a search be first procured." (Authorities cited.)

This Honorable Court decided this very question last year by adopting the decision of *People v. Schaumloffel*, (Nov., 1959), 53 Cal. 2d 91, Division Three, Second Appellate District, which also rendered the decision in the instant case, held in the former case this Honorable Court held that while there was probable cause for the arrest the resulting exploratory search was unlawful and the evidence inadmissable reversing the judgment of conviction of abortion.

There is no distinction between arrest made upon probable cause or upon warrant, for neither case extends the scope of search and seizure of evidence without search warrant for even with a search warrant the bounds of the search must be reasonable and specify the property to be seized, yet the officers may seize any evidence of crime and need not disregard it for failure to set it forth in the warrant.

The *Schaumloffel* case, *supra*, is directly in point on the unlawfulness of the exploratory search, citing *People v. Mills*, 14 Cal. App. 2d 392, for an exploratory search the seizure and use of the evidence at the trial over objection is no more lawful when done upon warrant of arrest without warrant.

The Appellate Court, in the present case, in its decision gave recognition to the motion to strike the evidence claimed to have been unlawfully seized, also to the objection that no sufficient foundation had been shown to connect such surgical instruments and articles with the offenses charged.

The prejudicial effect of the unlawfully obtained surgical instruments and articles is at once obvious, for the trier of facts, be Judge or jury would be far more inclined to believe the charges of abortion from the unconnected evidence that could possibly be used in performing the unlawful offenses even though such evidence was not remotely connected with the charges by any witness in the case.

The search and seizure of evidence in the Officer's exploratory expedition throughout the defendant's home, and the use of that unconnected evidence with any offense charged (admittedly so from the Court's decision), is a violation of the defendant's Constitutional right, to a fair and impartial trial.

It is to be noted that the question of the use of unlawfully obtained evidence has been removed from the mere realm of "admissibility of evidence" and placed (rightly so) in the realm of Constitutional Law as it deprives the accused of that fair and impartial trial guaranteed to all under the due process clause of both the State and Federal Constitutions, as held in *People v. Kiihoa* (Fed. 1960), 53 A. C. 851; *Rios v. United States* (1960), 364 U. S. 253, dissenting opinion by Mr. Justice Frankfurter, concurred in by Mr. Justices Clark, Harlem and Wittaker, interpreting the majority opinion as holding the admissability of unlawfully obtained evidence as a Constitutional question to be decided by both the State and Federal Courts.

In *People v. Robarge*, 111 Cal. App. 2d 87, the Court held that the due process of law includes the right to a fair and deliberate trial conducted in substantial conformity to law and in an atmosphere of calm judicial consideration, citing *Powell v. Alabama*, 287 U. S. 45.

III.

The Multiplicity of Penalties for the Same Intent and Design of Three Offenses Cannot Be Carved Into Eight Penalties Without Violating the Due Process of Law Clause of the Fourteenth Amendment.

The third point decided by the Appellate Court is in relation to the multiplicity of charges of Eight Counts of abortion involving but three women, is permissible under the authorities cited by various Appellate Courts.

The contention in the present case is not that it was prejudicial to make the several charges, but rather that the judgment and sentence on each of the Eight charges involving the three women is prejudicial to the rights of the defendant for he is punished twice or more times for the same offense.

The essential element, without which there is not offense, is the specific intent to cause miscarriage and therefore there is but one intent and one offense, whether it be use or employment of one or more instruments, types of medicines, drugs or substances or other means whatever, all at the same or different times, for to hold as the Appellate Court obviously has in the present case, then each use of an instrument each application of medicine, drug, substance or other means whatever, regardless of them, ten minutes or ten days is a separate and distinct offense.

Such is not and cannot be the true interpretation of the statute, for when there is but one general plan, impulse or scheme requiring a specific intent, there is a series of transactions, use of different instruments, and/or medicine or other substances, one and only one of-

fense takes place and while the prosecutor may carve several offenses out of various acts constituting the offense for the purpose of trial unless the Court orders the prosecutor to elect upon which particular act or what particular day the act took place, the jury may return verdicts on each charge contained in the accusatory pleading, but there can be only the one judgment and sentence for each set of acts and intent constituting but one offense.

In the case of *In re Hess* (1955), 45 Cal. 2d 171, the Court held that double punishment for the crime of rape is improper under Section 654 of the Penal Code, regardless of whether there is but one act or six different acts of rape.

The rules of pleading under Section 654 of the Penal Code, and the rules of punishment of but once for a criminal offense under Section 654 of the Penal Code, is recognized also in the crime of theft and other offenses.

In re Hess, supra;
People v. Lima, 127 Cal. App. 2d 29;
People v. How, 99 Cal. App. 2d 808;
People v. Freeman, 111 Cal. App. 2d 11.

In the offense of abortion there is but one intent, plan or scheme, by various use of instruments or medications and treatments, with the one intent present throughout the plan or scheme to abort and thus there can be but one punishment on each of the three women alleged to have been aborted, for such is the mandate of Section 654 of the California Penal Code, an auxiliary provision to the Constitutional prohibitation against double punishment.

It is respectfully urged that the petitioner was denied and deprived of a fair and impartial trial rendered void for lack of due process of law (*People v. Robarge, supra*), and the applicable decision of *Chicago M. & St. P. R. Co. v. Coogan*, 271 U. S. 472, wherein this Honorable Court held that guilt must be proved and not presumed from circumstantial evidence, and that the writ of certiorari issue as prayed for in this petition.

Prayer.

Wherefore, Petitioner prays that the writ of certiorari issue out of and under the Seal of this Honorable Court for its review and determination on a day certain named therein, the complete transcript of the record in the case numbered 2d Crim. 7050, entitled: The People of the State of California, Plaintiff and Respondent, v. Samuel D. Collins, Defendant and Appellant; that the judgment of the said District Court of Appeal of the State of California, Second Appellate District, Division Three, be reviewed and reversed by this Honorable Court and that the Petitioner have such other and further relief as may seem just and proper.

Respectfully submitted,

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HARRY E. WEISS,
Of Counsel.

FILE COPY

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IN THE

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No. 705

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

Appendix to Petition for Writ of Certiorari to the District Court of Appeal of the State of California, in and for the Second Appellate District, Division Three.

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APPENDIX.

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California.

[Crim. No. 7050. Second Dist., Div. Three. Nov. 14, 1960.]

The People, Respondent, v. Samuel D. Collins, Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County and from an order denying a new trial. John F. Aiso, Judge. Affirmed.

Prosecution for abortion. Judgment of conviction affirmed.

Paul D. McCormick for Appellant.

Stanley Mosk, Attorney General, and Clara E. Kauffman, Deputy Attorney General, for Respondent.

Ford, J.—The information in this case contained eight counts. In each count the appellant was charged with the crime of abortion. (Pen. Code, §274.)[1] It was also alleged that the appellant had been previously convicted of felonies as follows: in 1934, of abortion; in 1946, of abortion and murder; in 1946, of abortion. He pleaded not guilty as to each count and denied the first allegation of a prior conviction but admitted the

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[1]Section 274 of the Penal Code is as follows: "Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, is punishable by imprisonment in the state prison not less than two nor more than five years."

second and third such allegations. The appellant thereafter waived his right to trial by jury and, having withdrawn his denial, admitted the first allegation of prior conviction. He was found guilty as to each count. His motion for a new trial was denied and he was sentenced to the state prison for the term prescribed by law with respect to each count. He appeals from the judgment and from the order denying his motion for a new trial.

The appellant makes three main contentions. He asserts that there was not sufficient corroboration of the testimony of the women alleged to have submitted to the acts of abortion and of the testimony of accomplices. He claims that certain evidence was the product of an unlawful search and seizure and, further, that such evidence was inadmissible in any event because no proper foundation was laid to connect such evidence with the acts charged to have been done by the appellant in the present case. Finally, he contends that there was prejudicial error in that a single crime was improperly split into several parts, there being eight counts charging the crime of abortion with respect to the three women named in the information. In view of such contentions, it is necessary to give a summary of the evidence.

In the first count, it was alleged in part that on or about August 8, 1958, the appellant did unlawfully "provide, supply, use and employ an instrument and other means upon the person" of one Elaine with the intent to procure her miscarriage. In the second count, the woman named was the same Elaine but the offense was stated to have been committed on or about August 9, 1958. Elaine testified that on August 6, 1958,

she believed that she was pregnant and had been for three months. She was in good health. She discussed the matter with her husband and decided to terminate the pregnancy. She made a phone call to a particular number. A male voice, which she later recognized to be that of appellant, responded. It was arranged that she should "come in" on August 8 at 9 o'clock in the morning. She had been referred to the appellant by someone. At the appointed time, she went to his house with her husband. A woman admitted them, the woman being "short and stocky and with darkish grey hair." They met the appellant. She gave him $500 and went upstairs. Her husband went upstairs with her and then left. The appellant gave her "a little wine to relax" her. She was placed on a table which was equipped with stirrups and the appellant inserted in her a dilator and "then inserted something in it." She felt pressure and a little pain in the region of her vagina. She was on the table no longer than 15 minutes. He inserted something in her, "such as a packing of some sort, which was removed the next morning. It had a string on it. On the morning of the second day she was again placed on the table. She testified that he then "began working with some other instruments again dilating me, and that is when I could feel this tremendous pulling sensation and the pain that was involved therewith." The pulling sensation was in her uterus and vagina. She was on the table the second time 20 to 22 minutes. Her husband called for her and drove her home. Her pregnancy was terminated.

The husband of Elaine testified that he discussed his wife's pregnancy with her and decided to terminate it. He took her to the appellant's house, went inside.

and met the appellant. He went upstairs with his wife and then walked back downstairs with the appellant and told him to take good care of her. He gave his wife $500 on that day. When he took his wife home the following morning, she was tired and "looked rather pale, might say haggard." On that occasion he saw the appellant who said, "I will see you next year." He knew he was doing something illegal when he took his wife to the appellant's home. He took her there for the purpose of having something done with respect to her "not having a child."

Counts three, four, five and six related to acts upon the person of one Gail, the dates of the alleged crimes being, respectively, on or about September 27, September 28, September 29, and September 30, 1958. Gail testified that at the time of the trial, she was about 18 years old and that her place of residence was in another state. On or about September 27, 1958, she went to the appellant's house with Mrs. L. She met the appellant and gave him $500. She was in good health. She was pregnant and had determined to terminate her pregnancy. On that first day, the appellant gave her "a little bit of wine" to calm her and she was placed on a table with her feet in stirrups. There was a cabinet of tools in the room. She heard the clinking of instruments and felt something being inserted into her private parts. She could feel an instrument. She had a sensation of pain in "the vagina region and the uterus." She was on the table about 15 minutes. Later the appellant removed a catheter and some cotton from her private parts. The next day the appellant placed her on the operating table and inserted some instru

ments into her private parts which resulted in more cramping. This procedure took about 15 minutes. She felt pain in the uterus. That evening the same procedure was repeated. On the following day there was a similar occurrence. Thereafter, she returned to the place where she was staying in southern California and on the next day passed the fetus. When she returned to her home state, she had a dilation and curettement. A friend, Mrs. L., made the arrangements for her to go to the appellant and went with her. Gail went to a physician near Mrs. L's home both before and after she stayed at the appellant's house.

Mrs. L. testified that when she met Gail on her arrival in this state, Gail was pregnant. Before she took Gail to appellant's house, she had talked to him on the telephone. She told him that Gail was pregnant and that she was afraid that Gail "might be too far along." The appellant told her not to worry about it and that it was a very simple procedure. The appellant said that the charge would be $500. On September 27, 1958, she drove Gail to the appellant's house and went in with her and met the appellant. She thought that the appellant was a doctor. She met another woman there who was "short and dark and rather fleshy." The appellant told her not to worry about Gail. Mrs. L. left her telephone number where she could be reached. Gail had $500 with her. After three or four days, she returned for Gail. Before Gail saw the appellant, Mrs. L. had taken her to a physician near Mrs. L.'s home. When she took Gail to the appellant, she knew she was committing an unlawful act. She took her there to make arrangements with someone there to stop the pregnancy.

The physician who was mentioned in the testimony of Gail and Mrs. L. testified that he was a medical doctor and had examined Gail on September 16, 1958. In his opinion, she was approximately four months pregnant. He saw her again on September 30, but did not examine her because of what she told him.

Counts seven and eight related to acts upon the person of one Patricia, the dates of the alleged crimes being, respectively, December 18 and December 19, 1958. Patricia testified that on December 7 or December 8 she believed herself to be pregnant, the pregnancy being of about three and a half months' duration. She discussed her pregnancy with Mr. C. She decided that she would terminate the pregnancy. She was in good health. About December 18, she went to the appellant's house with Mr. C. At the house she met a woman who was "[s]hort and heavy set . . . and she had slightly grey hair. She gave the appellant $400. Thereafter she went upstairs. The appellant gave her a drink of wine to relax her. Later, at the appellant's request, she placed herself on a table which was equipped with stirrups. He inserted something into her "which was cotton and a rubber tube." She felt something in her vagina. She felt as though an instrument was inserted in her. She was on the table 10 or 15 minutes. What he left in her was a red rubber tube and a cotton ball. About 24 hours later, the appellant removed a cotton ball with an attached string. Later she returned to the operating table. The appellant removed instruments from a cabinet. He used an instrument to open her private parts and inserted something into her private parts. The sensation in her lower abdomen or her vagina was painful. She heard the sound of instru

ments "hitting together." She then returned to bed but later the appellant took her into the room again and there was an occurrence as on the second occasion. Thereafter she went to a physician who sent her to a hospital in January or early February. There she had a curettement. Mr. C was the cause of her pregnancy and she had discussed with him the fact that she was pregnant. They decided they would do something about it. Mr. C. gave her $400.

Mr. C. testified that he had a discussion with Patricia early in December of 1958 with respect to terminating her pregnancy. They reached an agreement that it would be done. He drove her to the appellant's house twice, once on an evening and again when he left her there. When he took her home thereafter, she appeared to be tired. He put his arm around her to help her down the stairs into the car which was in the driveway and the appellant asked him not to help her so obviously as he was doing but to let her walk on her own power. He gave Patricia $400 to be used for the purpose of having something done upon her body with respect to a pregnancy. He knew it was illegal.

The physician to whom Patricia went after leaving the appellant's house was called as a witness. He had also examined her prior to that time. On October 28, 1958, he was of the opinion that she had probably been pregnant for about six weeks. He felt that she probably could have gone a full term with her pregnancy. He later saw her on January 20, 1959. His impression at the time was that there had been an incomplete abortion. A dilation and curettage was done on January 23, 1959.

Howard E. Hooper, a member of the staff of the bureau of investigation of the office of the district attorney, testified on behalf of the prosecution. In the latter part of May 1959, he saw the appellant at his house. He had a warrant for the appellant's arrest. He took a number of photographs inside the house. He also obtained certain instruments in the house. He identified a vaginal speculum, a uterine sound, cotter, packing tools, two curettes and other surgical instruments, all of which came out of a cabinet upstairs. At the time he found these instruments, the appellant was downstairs under arrest. Mr. Hooper told the appellant he was going to take the articles as evidence. The appellant insisted that he have a receipt for them. Also found upstairs were about a thousand cotton balls and about 25 catheter tubes. The appellant said that the cotton was for his parakeets and was used in making the nests. The witness had no search warrant. The appellant told him not to search his place.

On behalf of the appellant, objection was made to the introduction in evidence of the objects seized in the course of such search on the ground that such search and seizure constituted an illegal invasion of the appellant's rights. A further ground stated was that no sufficient foundation had been shown so as to connect such articles with the offenses charged. The objection was overruled. A later motion to strike such exhibits, which was made on the same grounds, was denied.

The appellant did not testify as a witness on his own behalf. His niece testified with respect to the appellant's conversation with Mr. Hooper as to the use made

of the cotton. She elaborated upon such use in connection with the nests of the finches, canaries and parakeets kept in cages at the appellant's home. The wife of the appellant testified briefly upon the same subject. She further said that Mr. Hooper told the appellant to sit in a chair and not to move and that Mr. Hooper then left the room.

The evidence with respect to each count must, of course, meet the requirements of section 1108[2] and section 1111[3] of the Penal Code relating to corroboration if the conviction under such count is to stand. In determining the sufficiency of corroborative evidence, the same tests are applicable to both section 1108 and section 1111. In People v. MacEwing, 45 Cal. 2d 218, at page 224 [228 P. 2d 257], the applicable rule is stated as follows: "The corroborating evidence is sufficient if it tends to connect the defendant with the commission of the crime in such a way as may reasonably satisfy the jury that the witness who must be corroborated is telling the truth." The court further states, at page 225, the well-established rule that "corroboration is not adequate if it requires aid from the testi-

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[2]Section 1108 of the Penal Code is in part as follows: "Upon a trial for procuring or attempting to procure an abortion, or aiding or assisting therein, . . . the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence."

[3]Section 1111 of the Penal Code is as follows: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

mony of the person to be corroborated in order to connect the defendant with the commission of the offense charged." (See also People v. Brown, 49 Cal. 2d 577, 583 [320 P. 2d 5].) While the corroborative evidence need not by itself establish that the crime was committed or show all the elements thereof, it must relate to some act or fact which is an element of the offense. Although it may be sufficient even though it is slight and entitled to but little consideration when standing by itself, it must create more than a suspicion. (People v. Gallardo, 41 Cal. 2d 57, 63 [257 P. 2d 29].)

The sources from which the necessary corroboration may come have been clearly stated in People v. Gallardo, *supra,* 41 Cal. 2d 57 [257 P. 2d 29]. As therein said (p. 63), a woman who has submitted to an abortion is not an accomplice of the person or persons charged with procuring the miscarriage. Her testimony can be corroborated by that of a witness who was an accomplice and the testimony of the accomplice can be corroborated by that of the woman. Moreover, as further stated in the Gallardo case (p. 64): "Although the testimony of one woman that a person performed an abortion upon her is not of itself sufficient to corroborate the testimony of a second woman that the same person committed an abortion upon her [citations], it has been held that there is sufficient corroboration if the independent testimony of the woman shows that each abortion was committed in a similar manner." (To the same effect: People v. Weiss, 50 Cal. 2d 535, 568 [327 P. 2d 527]; People v. Bowlby, 135 Cal. App. 2d 519, 527 [287 P. 2d 547, 53 A. L. R. 2d 1147].) "One of the reasons for this is that the testimony of two people who independently

went through the same procedure tends to establish the credence of both." (People v. Kendall, 111 Cal. App. 2d 204, at 211 [244 P. 2d 418].)

A study of the evidence in the present case which has been set forth above leads to the conclusion that the requirements of section 1108 and section 1111 of the Penal Code with respect to corroboration were amply met. The corroborative evidence as to each count was complete in itself and did not require resort to the testimony of the witness who had to be corroborated for interpretation and direction. Such examination of the evidence when made in the light of the applicable rules leads so readily to the conclusion stated that no extended discussion of the matter is required in this opinion. It is sufficient to point out that each person who accompanied one of the women to the appellant's house testified that the appellant was present on such occasion, that the woman was left in the appellant's care for an extended period of time, that each woman had a substantial sum of money with her, and (except for the testimony of Mrs. L.) that upon leaving the appellant's house the woman appeared to be in a weakened physical condition. Mrs. L. testified that she made the arrangements with the appellant for an abortion with respect to Gail. Each woman's testimony clearly corroborated that of the person who knowingly brought her to the appellant's house for the illegal purpose. The testimony of the women showed that each abortion was committed in a similar manner.

In reaching the determination that the corroborative evidence was sufficient, we have treated as an accomplice the person who accompanied a particular woman to the appellant's house inasmuch as the evidence

supports the conclusion that such person was aware of the purpose and actively co-operated in accomplishing the result. By such conduct, such person aided and abetted in the commission of the offense. (People v. Davis, 43 Cal. 2d 661, 672 [276 P. 2d 801]; People v. Wilson, 25 Cal. 2d 341, 346 [153 P. 2d 720].) Upon the subject of corroboration, we have disregarded the testimony of the physician who examined Gail and saw her again after the alleged offense as well as that of the physician who examined Patricia because such testimony failed to connect the appellant with the alleged abortions. (People v. Brown, *supra*, 49 Cal. 2d 577, 584 [320 P. 2d 5].) In that connection, we have not considered the failure of the appellant to testify because, as said in People v. Goldstein, 136 Cal. App. 2d 778, at page 790 [289 P. 2d 581], such failure does not constitute the corroboration required by the statute although "it is nevertheless persuasive, lending weight to evidence presented by the prosecution upon matters presumptively within defendant's knowledge, and which if untruly stated would normally be denied by him." (See also People v. Dorn, 153 Cal. App. 2d 613, 617 [314 P. 2d 1017].)

We turn now to a consideration of the appellant's assertion that evidence which was received against him was obtained as a result of an unlawful search and seizure. The point is without merit. The arrest pursuant to the warrant was valid and the accompanying search of the premises incident thereto was proper, there being no requirement under such circumstances that a search warrant be first procured. (People v. Winston, 46 Cal. 2d 151, 162-163 [293 P. 2d 40]; People v. Coleman, 134 Cal. App. 2d 594, 599 [286 P. 2d 582];

see People v. Duroncelay, 48 Cal. 2d 766, 771 [312 P. 2d 690]; In re Dixon, 41 Cal. 2d 756, 761-762 [264 P. 2d 513].)

The further contention of a lack of foundation for the admission of the evidence seized at the appellant's house cannot be sustained. It is true that such seizure was in May of 1959, some months after the offenses alleged. But such fact did not bar the reception of such evidence. As stated in People v. Pollum, 97 Cal. App. 2d 173, at page 178 [217, P. 2d 463]: "The surgical instruments above mentioned were received in evidence over the objection of appellant. It is claimed this was error inasmuch as they were found in appellant's office more than a year after the times of the alleged offenses and were not shown to have been used by appellant upon any of the women. As already stated there was testimony that appellant admitted they belonged to him. There was also testimony that some of the women had been given hypodermic injections and that vaginal instruments of some sort had been used upon them. It is true that the discovery of the instruments in appellant's office was remote as to time but we do not regard the case as one in which it was necessary in order to render them admissible that evidence should have been produced from which it could reasonably be inferred that they had some connection with the commission of the crime. (See People v. McCall, 10 Cal. App. 2d 503 [52 P. 2d 500].) If it had been necessary to produce such evidence in the present case there was a failure of such preliminary proof. But it was not necessary to connect the instruments with the commission of the acts charged to render them admissible in evidence. Possession of the instruments

was evidence that defendant's office was equipped for the performance of operations of the nature described by the witnesses." The court further pointed out (p. 179) that the admission in evidence of the instruments was justified by the fact that they were suitable for use in the operation described by the witness and that it was for the trier of fact to determine from all the evidence what weight should be given to the fact that the instruments were found in the appellant's office about a year after the commission of the offenses. To similar effect is People v. Kendall, *supra*, 111 Cal. App. 2d 204, 212 [244 P. 2d 418]. In People v. Vosburg, 123 Cal. App. 2d 535, at pages 536-537 [266 P. 2d 927], it was said: "It is well settled that evidence of possession of instruments suitable for performance of abortions is admissible without the necessity of connecting the instruments with the commission of the crime."

The appellant's final contention is that there was prejudicial error in that a single crime was improperly split into several parts, there being eight counts charging the crime of abortion and but three women involved. Such position lacks substance. It was said of a similar contention in People v. Rhoades, 93 Cal. App. 2d 448, at pages 450-451 [209 P. 2d 33]: "Defendant's argument in support of her first contention is that the crimes charged in counts one and two were in fact but one crime, in that by the testimony of the prosecution witness it was shown that although she received two treatments such treatments were administered with the intent to abort but a single pregnancy, and that therefore she was placed in double jeopardy by being charged and convicted twice for what was but one offense. Such contention is without merit. . . .

"It is readily apparent that the gist of the crime is not the actual consummation of an abortion as such but rather it is the performing of any of the acts prohibited by said section [Pen. Code, §274] with the intent to procure a miscarriage which constitutes the crime of abortion. Therefore despite the fact that the same single pregnancy was involved in counts one and two, nevertheless, as the information charged and the evidence conclusively shows, in each instance there was an 'intent to procure' a miscarriage by prohibited means. . . . Consequently the complaint properly charged defendant with the commission of two separate crimes."[4] The Rhoades case was followed in the recent case of People v. Wilkes, 177 Cal. App. 2d 691, wherein it was said at page 698 [2 Cal. Rptr. 594]: "Defendant filed a demurrer to the information on the ground that 'the information charged the same offense twice.' The court overruled his demurrer. The information charged defendant with three separate counts of administering 'a substance' to Mrs. Muise. Each count was alleged to have involved the administration of 'a substance' on

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[4]We need not be concerned whether there was a variance in any instance between the date of a particular offense as pleaded and the date for its occurrence as shown by the proof. Thus, in People v. Cook, 136 Cal. App. 2d 442 [288 P. 2d 602], where the offense was alleged to have taken place "on or about the 4th day of August, 1954," but the proof was of an occurrence on August 5, 1954, the court said at pages 446-447: "In the first place, proof of the occurrence of an act on the day following that alleged is not a substantial variance. The fifth day was certainly *about* the fourth day. That much variance is not sufficient to mislead a prisoner in preparing his defense. (People v. Williams, 27 Cal. 2d 226 [163 P. 2d 692].) The precise time of a crime need not be declared in the accusatory pleading; it is sufficient if it alleges the commission of the offense at any time before the filing of the information, unless the time is a material ingredient in the offence.' (Pen. Code, §955.) No prejudice is shown to have resulted from the variance of one day between the allegation and the proof."

different days, *i.e.*, April 11, 12, and 19, 1958. He argues that in each count the act was the same; that it involved the same pregnancy, and that it was a splitting of the alleged offense into three parts. He therefore concludes that the demurrer to the information should have been sustained. In making this argument defendant misconceives the real basis of the offense. The gist of the crime is not the actual consummation of an abortion as such but rather the performance of any of the acts enumerated in section 274, Penal Code, with the intent to procure a miscarriage." (See also People v. Von Mullendorf, 110 Cal. App. 2d 286, 290-291 [242 P. 2d 403].)

There was substantial support in the evidence for the determination of the trial court with respect to each count. No error appears.

The judgment and the order denying the motion for a new trial are affirmed.

Shinn, *P. J.*, and Vallée, *J.*, concurred.